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IN THE

Supreme Court of the United States

October Term, 1961

No. .....

PAUL BOSTIC,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above-entitled case on February 7, 1962.

CITATIONS TO OPINIONS BELOW

The Supreme Court of Ohio, on January 17, 1962, dismissed this action on the ground that there was no debatable constitutional question involved and overruled a motion for leave to appeal. The decision printed in Appendix A hereto, *infra*, page 20, is reported in 173 Ohio St. 176, 35 Ohio Bar No. 10, March 5, 1962. The opinion of the Court of Appeals for the Tenth Appellate District of Ohio is unreported and is printed in Appendix A hereto, *infra*, page 12. The Court of Appeals affirmed the judgment of the Common Pleas Court sentencing the petitioner

to not less than two nor more than twenty-seven years in the Ohio Penitentiary upon conviction by a jury of breaking into a lock box and of grand larceny. There was no written opinion in the Common Pleas Court.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on January 17, 1962. Rehearing was denied on February 7, 1962. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

QUESTION PRESENTED

Whether the prosecution in a state case may extract evidence for scientific examination and testimony from physical objects within its control and return those objects for repair and removal from the jurisdiction, thus depriving the defendant in a criminal case of the same opportunity as the prosecution to offer scientific evidence on his own behalf.

CONSTITUTIONAL PROVISION

This case involves Section I of the Fourteenth Amendment to the Constitution of the United States which provides in part as follows:

> "• • • nor shall any State deprive any person of • • • liberty • • • without due process of law • • •"

STATEMENT OF THE CASE

On Saturday, January 16, 1960, sometime after 2:00 o'clock P. M. one or more persons broke into a building occupied by Chapman Motor Rebuilders at 295 East Gay Street, in the City of Columbus, Ohio, and removed a safe approximately three feet high, two feet wide and two feet deep. (R. 10) At approximately 10:30 o'clock P. M. on the same night, the safe was found in a secluded portion

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of the city wtih the safe door ripped open, papers and checks scattered and some $452.00 missing. The petitioner was arrested about 11:30 o'clock P. M. that night. Petitioner's clothes were examined and there was taken from petitioner's clothing one single pellet, (R. 168, 169, 172) one millimeter cube, of what the police chemist described as safe lining. (R. 165) This pellet was compared to the material removed from the safe lining which was remaining in the door of the safe. (R. 157) At the preliminary hearing held on the 27th day of January, 1960 in the Municipal Court of Columbus, Ohio it became obvious that the one thing tying the petitioner to the crime was the single pellet of gypsum found in his pocket. Oral requests to both municipal and county prosecutors having been rejected, a motion was filed on the 11th day of March, 1960 for permission to examine the safe by the petitioner. The prosecution opposed this motion by both written brief and oral argument. The court overruled the motion on September 20, 1960, shortly before the trial of the case. At the time of the trial, September 28, 1960, it first became known to the petitioner that the safe had been returned to the owners about a week or ten days after it was found by the Columbus police, namely, between January 23 and January 26, 1960. (R. 14, 16) The safe was returned to the owner's Cleveland office, repaired and restored to use. (R. 19) Thus even at the time of the preliminary hearing on January 27, 1960 at which the petitioner first learned of any scientific evidence against him extracted from the lining of the safe door, the safe was already out of the possession of the prosecution.

Not one word about the absence of the safe was communicated to the petitioner. The arguments made both orally and in writing by the State of Ohio in opposing the petitioner's request for an examination of the safe all indi-

cated that the safe was available but that as a matter of law the petitioner was not entitled to have it examined. The fact that the safe had been returned was obviously known or knowledge of the fact available to the prosecution while it was opposing petitioner's motion to examine it.

The trial court held without opinion that the petitioner was not entitled to examine the physical evidence before trial. The Court of Appeals held that physical evidence may be examined by the accused before trial but that since the safe had already been returned, the sustaining of petitioner's motion would not have helped him.

In sustaining the trial court, the Court of Appeals stated:

> "While we believe that the defense should have an opportunity to inspect or examine such prospective evidence if it is in the hands of the prosecution, the facts in the record indicate that at the time the motion was made, and at the time the motion was decided by the court, the property had already been returned to the owner and the sustaining of the motion would not have accomplished the aim of the defendant; and, therefore, we cannot say, based on the facts in this case, that the overruling of the motion was prejudicial to the defendant. There is no showing that the safe was returned with the idea of defeating any attempt by the defendant to inspect it."

In his concurring opinion, the Honorable John J. Duffey, P. J., stated:

> "But even under the present law, discretion must be reasonably exercised. The only facts known to the lower court at the hearing of the motion of March 11 afforded no reasonable ground to refuse the accused the right of inspection. I do not agree that *simply* because the particular relief requested in the motion was moot at the time it was ruled upon makes that overruling non-prejudicial. *The ruling of the court did in fact operate to hide the true location of the safe from the accused until the day the trial opened.*

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"If there were any indication in the record that the prosecutor's office or the police department deliberately attempted to hide from the accused the location of the safe, I would reverse. The mere fact of the obstruction to the preparation of the defense, regardless of its cause, is a very serious matter." (Emphasis ours)

However, he concurred in the majority opinion for the reason that petitioner should have obtained a subpoena for the safe and the trial recessed in the middle of its sessions until the safe arrived. For that reason he could not find that the obstruction to the preparation of the petitioner's case prejudiced him in the trial.

In the trial court all rulings were made by the Honorable Myron B. Gessaman. The *nunc pro tunc* entry, Appendix A, *infra*, p. 11, was signed by the Honorable Henry Holden. However the ruling was actually made by Judge Gessaman. The petitioner found himself caught between the self-contradictory rulings of the same judge. Before trial Judge Gessaman refused to permit an inspection of the safe because the motion was premature while at the trial the same judge denied the motion because it was too late.

The petitioner raised the question of his rights under the Constitution of the United States by objecting to testimony in the trial court, by asking the trial court for a new trial, by the First, Second and Fourth Assignments of Error to the Court of Appeals and by the First, Second and Third Assignments of Error to the Supreme Court of Ohio. Quotations from the record are printed in Appendix B hereto, *infra*, page 22.

The Supreme Court of Ohio, on January 17, 1962, overruled a motion for leave to appeal from the Court of Appeals for Franklin County and sustained a motion by the State to dismiss the appeal as of right. On February 7, 1962 an application for rehearing was denied by the Supreme Court of Ohio.

REASONS FOR GRANTING THE WRIT

1. The decision below denies petitioner the opportunity to present to the jury scientific evidence equal to that presented by the state.

The decisions of the courts below deny the petitioner his liberty without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States because they deprive him of a fair trial by denying him the opportunity to present to the jury scientific evidence to meet that presented by the state. Even if the petitioner had complied with all of the conditions set down for him by the Court of Appeals, namely to ask the court to continue the case in the middle of the hearing in order to subpoena the safe from Cleveland to Columbus and then have it examined by the petitioner, there is no showing that the petitioner would have been able to have the lining examined. Since the safe had already been repaired according to the state's own testimony, it would have been impossible without destroying or wrecking the door to extract from the lining of the safe door any gypsum to compare it to the pellet found in the petitioner's pocket. There is no authority for a court to order the destruction of the private property of one person in order to make available evidence for another. There was not even a showing by the prosecution whether the repair of the safe meant a repair of the original door from which the gypsum was taken, or whether the repair meant the replacement of a new door for the old door, thus making it impossible to have the examination made, even by ripping the door open. To place the burden of showing these various facts upon the petitioner would have been overwhelming with respect to evidence in the hands of a prosecution witness.

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2. The decision places an accused at the mercy of an unscrupulous prosecution.

The question presented is of importance in the administration of justice everywhere throughout the country. If this decision is allowed to stand, it will serve as an unfortunate precedent to allow the prosecution everywhere the opportunity of disposing of evidence and thereby depriving an accused of the opportunity of making any scientific examination. In this case the safe was apparently available and could have been subpoenaed, although such procedure would place a tremendous burden on the petitioner. It is but a short step to the next situation where the courts may well hold that there is no error even if the evidence is not available to subpoena. To hold as did the Court of Appeals, that the accused has the right to examine the safe while it is in the hands of the prosecuting attorney but that he has no right of examination when the prosecution voluntarily disposes of it, is to make a mockery of the rule itself. The majority opinion in the Court of Appeals states:

> "There is no showing that the safe was returned with the idea of defeating any attempt by the defendant to inspect it."

Even if that was the idea, how could petitioner ever show it? How can any accused ever show that a prosecutor's office or police department deliberately attempted to hide from the accused the location of the physical evidence. If this decision stands, what is to prevent any prosecutor's office or police department from doing this deliberately for the purpose of defeating inspection? Even the pre-

siding judge who concurred in the result with obvious reluctance stated:

> "The mere fact of the obstruction to the preparation of the defense, regardless of its cause, is a very serious matter."

An accused should be given an opportunity to defend equal to the opportunity of the state to prosecute. This decision places the accused at the mercy of any unscrupulous prosecutor or police department who may wish to dispose of evidence to keep the defense from examining it. It is asking the impossible for an accused to establish the mental attitude of a prosecutor or police department in disposing of evidence.

3. **The decision is in conflict with the principles established by this court in Campbell v. United States, 365 U. S. 85.**

The suggestion by the Court of Appeals in the case below that the petitioner should have subpoenaed the safe and thus had it available at the trial for the purpose of his motion to examine, is in conflict with the decision of this court in *Campbell v. United States*, 365 U. S. 85, 81 S. Ct. 421, 5 L. Ed. 2d 428 (1961). Although *Campbell* is a federal case, the problems are identical and the facts in the case at bar are in even much greater favor of petitioner than were the facts in *Campbell*. The *Campbell* case held that the ordinary rule based on considerations of fairness does not place the burden upon the litigant of establishing facts peculiarly within the knowledge of his adversary. In the case at bar, the safe which was removed was actually in the hands of the prosecuting witness. In the case at bar, as in the *Campbell* case, petitioner would be saddled with the unfairly severe burden of issuing the subpoena to Chapman Motors as his witness and also binding petitioner

with the answers. This case is even more strong on its facts than the *Campbell* case because in the case at bar the physical evidence was actually in the hands of the prosecution and was deliberately and voluntarily returned.

4. The decision is in conflict with the principles established by this court in Jencks v. United States, 353 U. S. 657.

The prosecution interrogating the witnesses about the safe and the condition of the safe, to all of which the petitioner objected, without giving the petitioner an opportunity to examine the safe, is no different than examining or cross-examining concerning a document without revealing the document to the other side. It is as important for the petitioner as defendant in a criminal case to have the safe examined as it was for the defendant Jencks to examine the documents in the federal prosecution when government witnesses testified regarding such matters. *Jencks v. United States*, 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103 (1957). In *Jencks* this court stated that the burden is on the government to decide whether the public prejudice of allowing a crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the government's possession. In the case at bar, there were no state secrets other than the fact that the safe had been returned by the prosecution. No harm could come to the state by producing the safe, other than the loss of a verdict if it was shown that there was a flaw in the so-called scientific evidence. The evidence was in the hands of the state's prime witness in both cases. If the *Jencks* case is to have any application to state prosecutions, this is certainly the situation in which it is applicable.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM GERTNER,
17 S. High St., Columbus 15, O.,
Attorney for Petitioner.

Columbus, Ohio
April 2, 1962

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APPENDIX A—1

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

No. 38103

STATE OF OHIO,

Plaintiff,

vs.

PAUL BOSTIC,

Defendant.

ENTRY NUNC PRO TUNC

[Filed December 22, 1960.]

It appearing to the court that heretofore, on the 20th day of September, 1960, an order of this court was made in which the motion of the defendant Paul Bostic for an order to permit the inspection of the safe belonging to Chapman Motor Rebuilders was overruled. It further appearing to the court that the entry journalizing said ruling was inadvertently mislaid and lost; and it appearing further that said order was duly made by this court on said date and the purpose thereof was clearly understood by all parties, but that through inadvertence the journal entry was never filed.

The motion of the defendant for an order to permit the inspection of the safe belonging to Chapman Motor Rebuilders which the defendant is alleged to have burglarized, having been presented to the court by memorandum and orally, the court finds said motion not to be well taken and the same is hereby overruled, to which finding and order

the defendant excepts. It is by the court now ordered that this ruling on the defendant's motion be now entered by the clerk of this court upon the journal of this court as of the date of September 20, 1960.

HOLDEN, Judge

APPROVED:
EARL W. ALLISON,
Prosecuting Attorney
FRED L. NEWSOM, JR.
Assistant Prosecuting Attorney
Attorneys for Plaintiff
ABRAHAM GERTNER
Attorney for Defendant

APPENDIX A—2

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 6631

STATE OF OHIO,
Plaintiff-Appellee,
vs.
PAUL BOSTIC,
Defendant-Appellant.

OPINION

[Rendered on July 5, 1961]

DUFFY, J.

The defendant-appellant was indicted on three counts, and upon trial the jury found him guilty of larceny, (Sec-

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tion 2907.20, R. C.) and forcing entrance into a depository box or safe, (Section 2907.12, R. C.) and he has received consecutive sentences to the Ohio Penitentiary.

In appealing to this court he has made the following assignments of error:

"1. The court erred in overruling the defendant's motion for an order to permit the inspection of the safe, which was necessary in order to properly prepare for trial.

2. The court erred in the admission of testimony concerning the condition of the safe because the safe was not introduced into evidence at the trial and appellant had no opportunity to have it examined.

3. The court erred in the admission of other evidence.

4. By being deprived of the opportunity of examining the safe by experts of his own choice, appellant was denied the opportunity to appear and defend in person and with counsel, contrary to Article I, Section 10, of the Ohio Constitution, and was denied a fair trial contrary to the due process of law provisions of the Fourteenth Amendment to the United States Constitution and the due course of law clause of Article I, Section 16, of the Ohio Constitution.

5. The court erred in sustaining objections where none were made.

6. The court erred in overruling the motion of defendant to dismiss at the end of the state's case.

7. The court erred in instructing the jury on conspiracy.

8. The judgment was contrary to law and against the weight of the evidence."

A review of the record indicates that following indictment by the grand jury the defendant-appellant filed a motion in the Court of Common Pleas on March 11, 1960, in which he asked the court "for an order allowing a chemist selected by the defendant to inspect and examine the

safe belonging to Chapman Motor Rebuilders which the defendant is alleged to have burglarized."

It appears that at the preliminary hearing the prosecution offered testimony indicating that a pellet of the safe lining one millimeter square, was found in the right pocket of defendant-appellant's jacket, and this pellet was alleged to have come from a Diebold safe owned by Chapman Motor Rebuilders, which was burglarized on January 16, 1960. In his memorandum the attorney for the defendant stated that—

> "As the state bases its case solely on the chemical similarity of the safe lining to the pellet alleged to have been found on the defendant, it is only fair that the defendant's chemist be allowed the same right of inspection already exercised by the state. If the defendant is forced to wait until trial to learn the contents of the safe lining, he is deprived of any effective opportunity to present his own scientific evidence."

The attorney for the defendant referred to Revised Code Section 2317.33, which provides that either party may demand of the adverse party an inspection and copy, or permission to take a copy, of a book, paper, or document in his possession or under his control; and while he did not contend that that section specifically granted the defendant the right to inspect the safe he did feel that it was strong evidence of legislative intention to permit the defendant to have an opportunity to examine evidence which he must meet. The motion was opposed by the prosecutor and was overruled by the court on September 20, 1960.

On September 23, 1960 the defendant filed a notice of proof of alibi, and trial was commenced on September 28, 1960. The first witness was the manager and part-owner

of Chapman Motor Rebuilders, whose establishment had been burglarized on January 16, 1960, and whose safe was stolen; and he testified that approximately ten days after the burglary the safe was returned to them by the police department and the safe was sent to their home office in Cleveland, Ohio, where it was repaired and is being used.

While we believe that the defense should have an opportunity to inspect or examine such prospective evidence if it is in the hands of the prosecution, the facts in the record indicate that at the time the motion was made, and at the time the motion was decided by the court, the property had already been returned to the owner and the sustaining of the motion would not have accomplished the aim of the defendant; and, therefore, we cannot say, based on the facts in this case, that the overruling of the motion was prejudicial to the defendant. There is no showing that the safe was returned with the idea of defeating any attempt by the defendant to inspect it.

The state did offer into evidence a specimen of the safe lining material, and a chemist who obtained the specimen did render an opinion that the safe lining material found in defendant-appellant's jacket was the same as the safe lining material taken from the safe of the Chapman Motor Rebuilders. The court gave the defendant the opportunity to have the state's exhibits examined but the defendant stated that he did not wish to have the particles in the state's exhibits examined but wished to have the safe examined. Several times during the trial the attorney for the defendant objected to any testimony regarding the safe and particularly photographs of the safe, and evidence dealing with the safe lining, because they had not had an oppor-

tunity to examine the safe. At the end of the defendant's case and before resting, counsel for the defendant stated:

"I would like to move to examine the safe itself."

to which the court replied:

"My goodness. The testimony now shows that the safe is in Cleveland. How am I going to get it here?"

The attorney then stated:

"Well, I don't know, but I would like to have that motion in the record."

The court then stated:

"I think you are too late with that motion. The testimony is that the safe is in Cuyahoga County. That motion will have to be overruled."

It is apparent from our review of the record that the defendant was attempting to preserve any grounds for appeal because of the overruling of the preliminary motion in which he asked that their chemist be given an opportunity to examine the stolen safe, even though he had learned at the beginning of the trial that the safe was not in Franklin County, and there was nothing to indicate that the safe itself would be produced in the courtroom. If the safe had been in the hands of the prosecution at the time of the preliminary motion or at any time during the trial of the case, we believe it would be proper to ask the court for an order permitting an examination of the safe. However, on discovery that the safe is in a county more than one hundred miles away the defendant should follow the processes provided by law in order to bring evidence from a distant county to court for use in a criminal case. See Section 2945.45, Revised Code.

In the rulings on motions in regard to examination of the safe, it would appear that the trial court exercised its discretion and from a review of the entire record we cannot say that there was an abuse of discretion particularly since there is nothing in the file to indicate that there was any reason for the court to believe that the safe lining obtained by the police chemist and offered into evidence was not safe lining from the safe which had been broken into. Defendant could have subpoenaed the safe had he thought it essential to his defense.

Having considered the other assigned errors they will be overruled, and judgment of the trial court will be affirmed.

Judgment affirmed.

BRYANT, J., concurs.

DUFFEY, P. J., concurs in judgment.

DUFFEY, P. J., concurs.

The law of Ohio gives the trial court discretionary power to refuse the accused a right to examine physical evidence in the hands of the state prior to trial. This doctrine is an arbitrary segment of the archaic English common law rules of pre-trial discovery—rules which were themselves arbitrary in their inception.

But even under the present law, discretion must be reasonably exercised. The only facts known to the lower court at the hearing of the motion of March 11 afforded no reasonable ground to refuse the accused the right of inspection. I do not agree that *simply* because the particular relief requested in the motion was moot at the time it was ruled upon makes that over-ruling non-prejudicial. The ruling

of the court did in fact operate to hide the true location of the safe from the accused until the day the trial opened.

If there were any indication in the record that the prosecutor's office or the police department deliberately attempted to hide from the accused the location of the safe, I would reverse. The mere fact of the obstruction to the preparation of the defense, regardless of its cause, is a very serious matter. In the present case the defendant did have an opportunity during trial to test the chemical analysis relied upon by the prosecution. The particle allegedly found on the defendant and the comparison sample were available. With respect to the safe itself, the defendant learned of its whereabouts on the first day of trial. Nothing in the record indicates that the action of the police in releasing it to the owner, and its subsequent repair, destroyed its usefulness to the defense. Thus, if the defendant wished to challenge the identity of the prosecution's comparison sample, or simply examine the safe for what it might reveal, a subpoena could have been obtained and, if necessary, a continuance requested. On this record I cannot find that the obstruction to the preparation of the defendant's case prejudiced him in the trial. For this reason I concur that the overruling of the motion of March 11 was erroneous but not prejudicial.

I also concur with the principal opinion that the motion made at the end of defendant's case was improper, and that the other errors assigned must be overruled.

APPENDIX A—3

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 6631

STATE OF OHIO,
Plaintiff-Appellee,

vs.

PAUL BOSTIC,
Defendant-Appellant.

ENTRY

[Filed August 31, 1961]

This cause came on to be heard upon notice of appeal, transcript of the original docket and journal entries, original papers including bill of exceptions and assignment of errors from the Court of Common Pleas, Franklin County, Ohio, and the cause was submitted to the Court on briefs and oral argument of counsel.

The Court being fully advised in the premises, upon consideration of the same, finds that there is error in the proceedings and in the said record in that defendant-appellant did not have an opportunity to examine the prospective evidence in the hands of the prosecution, to which finding plaintiff-appellee excepts. However, the Court finds that such error is not prejudicial to the defendant-appellant, to which finding defendant-appellant excepts.

The Court further finds that the judgment of the Court of Common Pleas should be and the same hereby is affirmed

and that defendant-appellant is ordered to pay the costs herein, to which finding and order defendant-appellant excepts.

APPROVED:

FRED L. NEWSOM, JR.
Attorney for Plaintiff-Appellee

ABRAHAM GERTNER
Attorney for Defendant-Appellant

JOHN J. DUFFEY
Judge

WILLIAM C. BRYANT
Judge

JOHN C. DUFFY
Judge

APPENDIX A—4

THE STATE OF OHIO, APPELLEE, *v.* BOSTIC, APPELLANT.

Supreme Court — Dismissal — No debatable constitutional question involved—Criminal law—Forcing entrance into safe and larceny—Sections 2907.12 and 2907.20, Revised Code—Evidence—Due process.

(No. 37286—Decided January 17, 1962.)

APPEAL from the Court of Appeals for Franklin County.

Mr. Earl W. Allison, prosecuting atttorney, and *Mr. Fred L. Newsom, Jr.*, for appellee.

Mr. Abraham Gertner, for appellant.

The appeal as of right herein is dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

WEYGANDT, C. J., ZIMMERMAN, MATTHIAS, BELL, HERBERT and O'NEILL, JJ., concur.

APPENDIX A—5

IN THE SUPREME COURT OF OHIO

JOURNAL 44, PAGE 518

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR FRANKLIN COUNTY.

It is ordered by the Court that this motion is overruled.

JOURNAL 44, PAGE 518

MOTION BY APPELLEE TO DISMISS APPEAL AS OF RIGHT. FRANKLIN COUNTY.

It is ordered by the Court that this motion is sustained.

JOURNAL 44, PAGE 520

APPEAL FROM THE COURT OF APPEALS FOR FRANKLIN COUNTY.

This cause, here on appeal as of right from the Court of Appeals for Franklin County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the plaintiff-appellee recover from the defendant-appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of

this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

JOURNAL 44, PAGE 558

REHEARING DOCKET

Upon consideration of the application for rehearing, it is ordered by the Court that rehearing is denied.

APPENDIX B—1

EXAMINATION OF OFFICER LESTER L. CRIST

Examination of Police Officer Lester L. Crist by Assistant Prosecuting Attorney, Fred L. Newson (R. 44, 46-47):

Q. And what was the condition of the safe at the time that you found it there? A. It was all busted open.

Mr. Gertner: Your Honor, please, I will object to this statement regarding the condition of the safe, and any other testimony regarding the safe, unless it is available for examination by the defense.

The Court: Overruled.

Mr. Gertner: And I would like to give to the Court some authority.

The Court: Under the defense in this case, I don't see that the objection is well taken.

Mr. Gertner: The defense is Not Guilty in this case, Your Honor.

The Court: I understand. The objection is overruled.

Mr. Gertner: Can I offer you some authorities?

The Court: Well, step up to the Bench.

(At this point the Court and counsel conferred at the Bench out of the hearing of the Jury, during which time

Mr. Gertner presented to the Court some authorities which the Court read.)

The Court: The objection is overruled. What was the last question?

(Last question and answer read by Reporter.)

Mr. Gertner: Note an exception, please.

APPENDIX B—2

EXAMINATION OF OFFICER ALLEN FRALEY

Examination of Police Officer Allen Fraley by Assistant Prosecuting Attorney, Fred L. Newsom (R. 75, 77):

Q. What if anything did you observe at that time back there? A. I found a safe that had been peeled.

Mr. Gertner: I object to the condition of the safe.

The Court: Overruled.

APPENDIX B—3

EXAMINATION OF OFFICER JAMES W. FROST

Examination of Police Officer James W. Frost by Assistant Prosecuting Attorney, Fred L. Newsom (R. 106, 108):

Q. And what was the color of that safe, do you recall? A. Gray.

Q. And what was the condition, as you saw it, on that particular morning?

Mr. Gertner: I will object to the condition of the safe.

The Court: What is your objection? The same one you had before?

Mr. Gertner: Same one.

The Court: Overruled.

APPENDIX B—4

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

No. 38103

THE STATE OF OHIO,

Plaintiff,

vs.

PAUL BOSTIC,

Defendant.

MOTION FOR NEW TRIAL

[Filed November 2, 1960]

Now comes the defendant, Paul Bostic, and makes application to the court for a new trial for the following causes, each of which materially affects his substantial rights:

• • •

2. Orders of the court by which this defendant was prevented from having a fair trial.

• • •

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APPENDIX B—5

IN THE COURT OF APPEALS, FRANKLIN COUNTY, OHIO

No. 6631

STATE OF OHIO,

Plaintiff-Appellee,

vs.

PAUL BOSTIC,

Defendant-Appellant.

ASSIGNMENTS OF ERROR

[Filed January 5, 1961.]

The appellant, Paul Bostic, says there was error prejudicial to this appellant in the judgment, final order and proceedings of the Common Pleas Court of Franklin County, in the following respects:

1. The court erred in overruling the defendant's motion for an order to permit the inspection of the safe, which was necessary in order to properly prepare for trial.

2. The court erred in the admission of testimony concerning the condition of the safe because the safe was not introduced into evidence at the trial and appellant had no opportunity to have it examined.

* * *

4. By being deprived of the opportunity of examining the safe by experts of his own choice, appellant * * * was denied a fair trial contrary to the due process of law provisions of the Fourteenth Amendment to the United States Constitution * * *

APPENDIX B—6

IN THE SUPREME COURT OF OHIO

No. 37286

STATE OF OHIO,
Plaintiff-Appellee,

vs.

PAUL BOSTIC,
Defendant-Appellant.

ASSIGNMENTS OF ERROR

[Filed October 16, 1961]

For his assignments of error Paul Bostic, defendant-appellant herein, says * * *:

1. The Court of Appeals erred in holding that the trial court's refusal to permit the inspection of the safe was not prejudicial although erroneous.

2. The Court of Appeals erred in affirming the judgment against the appellant based upon evidence concerning the condition of the safe, because the safe was not introduced into evidence at the trial and the appellant had no opportunity to have it examined.

3. By being deprived of the opportunity of examining the safe by experts of his own choice, appellant * * * was denied a fair trial contrary to the due process of law clause of the Fourteenth Amendment to the Constitution of the United States * * *